

**PROPOSALS RELATING TO SECTION 11 OF
THE CRIMINAL INJURIES COMPENSATION ACT**

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

June, 1987

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor Douglas A. Schmeiser, Q.C., B.A., LL.B.,
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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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I. INTRODUCTION

In 1967 Saskatchewan became the first province in Canada to enact legislation providing for the compensation of victims of crime. The Criminal Injuries Compensation Act¹ provides for compensation for victims or the dependents of victims injured or killed as a result of certain criminal acts. The Crimes Compensation Board established in the Act has absolute discretion whether compensation will be paid.² Further, the Board is given wide discretion under Section 11 as to what circumstances the Board may consider in making its decision. Section 11 states:

11. The board, in making an order under section 10, shall consider and take into account all such circumstances as it considers relevant to the making of the order and, without limiting the generality of the foregoing, the board shall consider and take into account:

(a) any behaviour that directly or indirectly contributed to the injury or death of the victim;

(b) the financial need of the person who was injured or of the dependents of the victim.

Concern has arisen that the discretionary powers given to the Board under Section 11 are too wide. In particular, there is some evidence that the Board has denied applications or reduced

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R.S.S. 1978, c. C-47, in this paper, the "Act".

² This discretion is subject to Section 12 which lists specific situations where the Board is directed not to make an order. These situations are unrelated to the issues discussed in this paper.

the amount of compensation awarded because it did not consider the victim to be "innocent". This paper examines Section 11 and these concerns.

II. THE INNOCENT VICTIM

A. Decisions under Section 11

Several decisions of the Board illustrate the manner in which the Board has exercised its wide discretionary powers under Section 11. In award #1363/85 the applicant arrived at his residence at about 2:00 a.m. after having consumed alcohol at another location. He found a party in progress. He proceeded to the kitchen where he turned on his radio. An argument erupted between the applicant and a stranger over the sound of the radio. The stranger pulled out a gun and shot the applicant several times. The applicant sustained severe injuries. The stranger was convicted of attempted murder. However, the applicant's claim was denied on the basis that he was intoxicated by drugs and alcohol and that he did not initially co-operate with law enforcement authorities. The intoxication of the applicant seemed to be more significant than the irrational behaviour of the stranger and the right of the applicant to behave as he saw fit in his own home.

In award #1446/86 the applicant applied for compensation for injuries suffered in a knife attack. The applicant was leaving a licensed beverage room in an advanced state of intoxication. He

was approached by two men who stabbed him several times. One of the assailants was charged with attempted murder and the Board found the applicant to be a victim of crime. The applicant's award was reduced by fifty percent, however, because he was intoxicated and he failed to fully co-operate with medical authorities. In its award the Board did not establish a causative link between the applicant's intoxication and the attack.

In award #1233/84 the Board similarly reduced an award on the basis of intoxication of the applicant. In this case the Board was satisfied that the applicant was a victim of sexual assault and also that she fully co-operated with the law enforcement authorities. However, the applicant's award was reduced by twenty percent. In the award the Board did not state that the applicant had been careless or imprudent or that if she had not been drinking she would not have been sexually assaulted.

In award #1285/85 the applicant was sexually assaulted by two men who were both convicted of sexual assault. The Board determined that the applicant was not an innocent victim and denied the application because of her advanced state of intoxication but also because the Board felt the applicant had voluntarily put herself into circumstances that contributed to her injury.

The decisions of the Board that have caused concern are not limited to those involving intoxication. In award #1177/84 the applicant was stabbed in a beverage room. The applicant was a minor and was breaking the curfew requirements of her probation order at the time of the incident. Additionally, the applicant did not co-operate with the medical authorities and discharged herself early from hospital. Because of these factors the Board determined that the applicant was not an innocent victim and denied the application. The Board's decision was overturned by a judge of the Court of Queen's Bench³ but the Saskatchewan Court of Appeal reversed this ruling and upheld the Board's decision.⁴

B. Conduct of the Victim

The broad discretion given to the Crimes Compensation Board of Saskatchewan is not unique. Criminal injuries compensation legislation across Canada grants the boards' significant scope to consider the conduct of the victim. Yet the issue of the innocent victim remains "perhaps the single most perplexing issue to be resolved"⁵ in the administration of crimes compensation schemes.

³ Foy v. Crimes Compensation Board (Sask.), (1986), 41 Sask. R. 70.

⁴ Foy v. Crimes Compensation Board (Sask.), (1986), 44 Sask. R. 108.

⁵ D. Miers, Responses to Victimisation, Oxon: Professional Books, 1978, at 169.

There is little doubt that crimes compensation boards need broad discretion. Flexibility is necessary so that the board may make fair decisions on the diverse cases that come before it. The problem, however, is that the broad discretion permits the perpetuation of the notion that crime victims are generally responsible for their own misfortune. This notion is exhibited in board decisions in two related ways. Firstly, Canadian boards tend to let the status of the victim interfere with their decisions. Decisions become based on the "administrators' perception of what comprises socially desirable characteristics".⁶

The danger in this, is that the victim may be penalized merely for being at the wrong place at the wrong time, with characteristics (wealth, youth, old age, defencelessness, female, a₇ minority) that attract a potential criminal.

Victims of crime tend to be concentrated among certain groups in society. These groups include individuals with a certain status, i.e., the poor and weak and groups characterized by behaviour, i.e., drunks and others who expose themselves to risks.⁸ A Saskatchewan decision in which the Board in part

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Ibid., at 170.

⁷ R. Murphy, "Compensation for Victims of Crime: Trends and Outlooks" (1984), 8 Dal. L.J. 530 at 533.

⁸ P. Burns, Criminal Injuries Compensation: Social Remedy or Political Palliative for Victims of Crime?, Vancouver, Butterworth & Co. (Canada) Ltd., 1980, at 344.

denied an application on the basis of the status of the victim is In the Matter of the Application of "H", award #26/69. In this case a prostitute was living with a man she claimed was her common law husband. Over the years they were together he lived off the avails of her prostitution and on a number of occasions had beaten her. The evening before the incident the applicant told the man that she was leaving him and when she returned to their home the next morning, he shot her. The applicant sustained four bullet wounds. In the award the Board rejected her claim and stated:

The Applicant knew the offender and his propensity for violence...[S]he might have expected some reprisals and endeavoured to govern herself accordingly...The actions of the offender were unjustified but it should also be pointed out that living on the avails of prostitution is in itself a serious criminal offence which the Applicant permitted and enabled.

Clearly the Board was of the opinion that the victim could not be compensated because of her occupation.

Secondly, boards tend to draw a loose connection between the behaviour of the victim and the injury sustained.

Very difficult issues of causation arise in this field, often pointing to subtle questions of degrees of involvement. No doubt victims sometimes do precipitate their own doom and often they lead less than angelic lives....[T]he Compensation Boards are well aware of this fact and often callously reduce awards at the slightest hint of victim fault or wrongdoing.

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Murphy, supra, footnote 7 at 533.

The Saskatchewan decisions discussed above illustrate the willingness of the Board to deny or reduce an award on the basis of the conduct of the victim without clearly establishing a causal connection between the conduct and the injury sustained.

The role that the conduct of the victim should have in the compensation decision-making process depends on the rationale behind the compensation scheme.

The only tenable rationale for a Canadian compensation scheme is that it is seen as representing a form of state charity or social welfare based at least in part on the moral duty to aid innocent sufferers of an egregious event that might befall any of us.

Where it is accepted that compensation schemes are rationalized on this approach alone, it is clear why the innocence of the victim is of paramount importance. It is considered unacceptable to use taxpayer's dollars to reward those with unclean hands. The right to society's charity therefore depends in part upon the victim meeting the standards accepted by society. These standards are reflected in the boards' "perception of goodness and badness, of socially acceptable traits in others, and of deviance".¹¹

It must be recognized, however, that beyond the desire to show concern for individuals, compensation schemes can benefit society as a whole. While the schemes may not encourage

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P. Burns, supra, footnote 8, at 140.

¹¹ Miers, supra, footnote 5, at 239.

reporting of crimes because most people are unaware of them, fair treatment of applicants may help to restore confidence in the administration of justice. In the past considerable emphasis has been placed on the rights of the accused and the adoption of compensation schemes serves to redress the balance between the victim and the criminal. This goal will not be achieved where the victims' actions are strictly measured against the moral standards defined by compensation boards. Additional victimization in the justice system will only alienate the victim. Further co-operation by victims with authorities is not encouraged when they are denied support because their behaviour did not quite live up to society's standards.

All compensation schemes in Canada include conduct of the victim as a factor in determining whether compensation should be awarded or what amount should be given. As stated by The Honourable Mr. Justice Brian Dickson, now Chief Justice of the Supreme Court of Canada, "[t]he emphasis is on innocent victims."¹² The Commission believes that while the conduct of the victim is still important in denying the claims of victims who have clearly contributed to their injuries, the emphasis in board decisions should be directed away from the issue of the innocence of the victim.

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"The Forfotten Party - The Victim of Crime" (1984), 18 U.B.C. L.R. 319 at 330.

III. ALTERNATIVE SOLUTIONS

In New Zealand where the first crimes compensation scheme was established, the criminal injuries compensation scheme is based on an insurance approach. This approach focuses not so much on the need of society to protect standards of acceptable behaviour but on the concept that the impact and burden of crime in society should be borne by society generally rather than by individuals. In the insurance approach, need of the victim is of greater importance than the morality of the victim. It has been suggested that this is the approach which should be taken.

...[T]he many inconsistencies and anomalies that beset the schemes currently in force form some of the most cogent reasons for abolishing them altogether, or at least for assimilating them into a comprehensive accident compensation programme...

However, as there is little movement in Saskatchewan towards¹³ a comprehensive no-fault accident insurance scheme that would encompass crimes compensation, proposal of such a scheme is not practical at this time.

Another approach which would eliminate evaluation of the conduct of the victim is to remove the ex gratia and discretionary nature of the scheme. The scheme would start with the premise that all victims have a right to compensation. Removal of the discretionary aspect of the scheme would require

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Miers, supra, footnote 5, at 240. In addition, the Canadian Federal-Provincial Task Force on Justice for Victims of Crime Report, Canada, 1983, recommended a task force to look into the possible use of insurance-based compensation schemes.

the creation of a detailed list of situations where compensation would be denied. The detail that would be required to make such a section complete and workable would be virtually impossible to obtain. Further, it would be argued that this approach is too costly. The likely response to this concern would be the legislative adoption of maximum allowable awards. The use of such ceilings is undesirable. "Monetary restrictions are clearly meant to protect the public treasury, but they can be rather harsh for individual victims."¹⁴ Given the present limitation of economic resources, a proposal that might be seen as substantially increasing the costs of the scheme is not recommended.

Finally, the Uniform Criminal Injuries Compensation Act adopted by the Commissioners on Uniformity of Legislation in, Canada does not provide any solution to this problem. Section 25 of that Act is in substance the same as Section 11 of the Saskatchewan Act.¹⁵

IV. RECOMMENDATION

The Commission believes that the solution to the problem of the innocence of the victim lies in changing Section 11 of the Act to direct the attention of the Board away from the issue of

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Dickson, supra, footnote 12, at 300.

¹⁵ Proceedings of the Fifty-Second Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1970) at 67.

the behaviour of the victim.¹⁶ At present Section 11 allows the Board to consider all circumstances, and in particular the conduct of the victim where it directly or indirectly contributes to the injury of the victim. The Commission recommends that the Board should continue to be directed to have regard to all relevant circumstances, but that it should not have regard to the behaviour of the victim unless that behaviour directly contributed to the injury or death of the victim. The behaviour or status of the victim is only relevant where it has contributed to the injury. This change will require the board to give greater consideration to the causation issue, and perhaps prevent the presumption that the behaviour of the victim contributed to his injuries. Further, where the Board considers behaviour of the victim that is clearly unrelated to his injuries, the applicant will be able to obtain judicial review on the grounds that the Board considered that which it was directed not to consider.¹⁷

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The Commission prefers "behaviour" to "conduct" on the grounds that it may encompass more than simply the physical actions of the victim.

¹⁷ Consideration of extraneous matters by an administrative tribunal is accepted as one of the grounds upon which an applicant is entitled to judicial review notwithstanding a privative clause such as the one found in Section 33 of the Saskatchewan Act. Foy v. Crimes Compensation Board (Sask.), supra, footnote 4, (1986), 44 Sask. R. 108, at 109-110.

In addition, the Board might re-evaluate the causal connection between the behaviour of the victim and the injury if Section 11 permits consideration of the behaviour of the victim only where it "directly" contributes to the injury of the victim. The use of the word "indirectly" now found in Section 11 seems to allow disentitlement on the slightest connection between the behaviour of the victim and the injury.

Section 11 provides that the Board may take into account all circumstances it considers relevant. It might be argued that the Board alone can determine what is relevant and that an appeal to the courts on the ground that the board considered extraneous matters should be precluded. In the Commission's opinion, however, the Board should not be able to consider with impunity any circumstance which is not related to the injury, on the grounds that it considered the circumstance relevant. As mentioned above, an applicant's right to apply for judicial review where an administrative tribunal considers extraneous matters is recognized in Saskatchewan, and should not be denied in this case. Accordingly, the words "as it considers relevant" should be removed from Section 11.

Finally, it would be beneficial if the Board avoided the use of the term "innocent victim" in awards. Section 11 does not require a victim to be innocent. It merely allows the Board to take into account conduct that contributes to the injury. If the Board thinks that the victim's conduct did contribute to his

injury, it should state how it did so, and that the award was denied or reduced for this reason. The statement that the victim was not innocent is unnecessary and contributes further to the victimization of the applicant.

The Commission therefore recommends that Section 11 of The Criminal Injuries Compensation Act be amended to read as follows:

11. The Board, in making an order under section 10, shall have regard to all relevant circumstances, but the Board shall not have regard to the behaviour of the victim unless it directly contributed to the injury or death of the victim.¹⁸

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Section 11(b) of the Act referring to the financial need of the victim has been deleted. If the Board considers financial need to be pertinent, it can consider it as a "relevant" circumstance under the proposed Section 11.